No. 4363

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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WONG LUNG SING, alias WONG MAT,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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I.

### STATEMENT OF THE CASE.

The plaintiff in error, Wong Lung Sing and his co-defendant Charley Wong You, were jointly indicted in the Southern Division of the District Court of the United States, Northern District of California, the indictment containing two counts.

The *first count* alleges that the accused violated

> "a requirement of the Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, in that they, the said defendants did then and there wilfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces,

15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

The *second count* alleges that the accused violated

"a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that he, the said defendant, did then and there knowingly, willfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

The prosecution against the co-defendant Charley Wong You was discontinued, he having become insane after arrest. (This appears but dimly in the Transcript. Trans. Rec. 6.) At the conclusion of the evidence of the trial of plaintiff in error, his counsel made a motion for a directed verdict. (Trans. Rec. 29.) The motion was renewed at the end of the case (Trans. Rec. 40) and denied, the defendant duly reserving an exception. The jury returned a verdict of guilty as charged on each count. The Court sentenced the defendant to be imprisoned "for a period of three years in the United States Penitentiary at McNeill Island, Washington, as to each of the two counts of the indictment. Said judgments of imprisonment to

run concurrently and that he pay a fine of $1,000." (Trans. Rec. 63.) In due time the defendant, Wong Lung Sing, sued out a Writ of Error and on the Writ presented his case upon the Record, including a Bill of Exceptions containing all the evidence. (Trans. Rec. 54.) It is the contention of the plaintiff in error: (1) That the indictment does not state facts sufficient to constitute *prima facie* a crime or public offense; (2) That the evidence is insufficient to justify or sustain the verdict and judgment; (3) Error in overruling the objection to the admission in evidence of a dress suitcase containing 55 cans of opium.

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## II.

### SPECIFICATIONS OF ERROR.

The plaintiff in error specifies the following errors in support of his prayer for the reversal of judgment, viz.:

1. The Court erred in admitting in evidence over the objection of the defendant a certain suitcase and its contents, being 54 five tael cans of smoking opium. Said objection was that said suitcase and its contents had been seized as the result of an unlawful search and that said evidence was immaterial, irrelevant and incompetent as to the defendant, to which ruling the defendant excepted.

2. The Court erred in denying the motion of defendant for a directed verdict of "not guilty"

at the close of the evidence in said case, upon the first count of said indictment upon the ground that there was no evidence that the defendant had received or transported or facilitated the transportation of opium, knowing the same to have been unlawfully imported into the United States; to which ruling the defendant excepted.

3. The Court erred in denying the motion of defendant for a directed verdict of "not guilty" upon the second count of the indictment, made at the close of the evidence, upon the ground that there was not evidence that the defendant had purchased, or sold or distributed any opium, not in nor from the original stamped packages; to which ruling the defendant excepted.

4. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the first count of said indictment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

5. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the second count of said judgment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

## III.

## BRIEF OF ARGUMENT.

### 1. The Indictment Charges No Crime.

We contend that neither the first or second count of the indictment charges a crime or public offense in violation of any law or statute of the United States. The *first count* attempts to charge that the acts therein alleged, constitute a violation of the Act of February 9, 1909, as amended (42 Stat. 596). No *facts* are alleged in the first count showing that the opium was *imported* into the United States, contrary to law. There is not even an averment that the importation was made contrary to law nor that the opium had been imported. True it is alleged that the defendants *knew* that it had been imported "contrary to law," but this does not conform to the fundamental requirements of criminal pleading that the essential fact of importation be directly and not inferentially nor argumentatively alleged and that *facts* showing an importation contrary to law and not the legal conclusion itself, be pleaded.

The allegation that the defendants *knew* that the opium had been imported contrary to law, is neither an averment of importation, nor an averment of facts, showing an importation contrary to law. Alleging even an importation contrary to law, would be merely the conclusion of the pleader, a mere conclusion of law, and as such involving an essential element of the offense as defined by the statute, but

not as averred as to be susceptible of trial and determination by jury, *the facts not being alleged.*

It is true that the inference argumentatively arises that if as alleged the defendants *knew* that the opium had been imported contrary to law, it must have been so imported, or else they could not know it; but this is pleading by inference and argument instead of complying with the elementary rule of criminal pleading that the *facts* showing an importation contrary to law be pleaded by positive and direct averment and not inferentially.

*United States v. Hess,* 124 U. S. 486;
*Pettibone v. United States,* 148 U. S. 202.

In the next place the averment that the defendants *knew* that the opium was imported into the United States "contrary to law," if construed as an averment of importation "contrary to law," is a mere *conclusion of law* on the part of the pleader and not an averment of fact. It does not give the accused the requisite information of the nature and cause of the accusation, guaranteed him by the Sixth Amendment of the Constitution of the United States, as to the essential element of an importation contrary to law, for it does not inform him of the *facts* constituting such importation, as the basis of the charge.

It is stated by the Supreme Court of the United States in holding that an allegation in an indictment that contraband goods were imported "con-

trary to law" is fatally defective; that the *facts* must be averred showing that such is the character of the importation.

Said Mr. Justice White, in the case of *Keck v. U. S.,* 172 U. S. 434, 437:

> "The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in Section 3082 itself; but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not per se contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess* case, at page 486, 124 U. S., and page 573, 8 Sup. Ct.:
>
> 'The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.' "

*Keck v. United States,* 172 U. S. 434, 437; 19 Sup. Ct. Rep. 254, 255.

It is elementary in criminal pleading that an allegation of what is but a *conclusion of law* on the part of the pleader, respecting an essential element

of the offense attempted to be charged is fatal to the accusation.

*Johnson v. United States,* 294 Fed. 753 (9th Circuit);
*United States v. Mills,* 7 Pet. 142;
*United States v. Cook,* 17 Wall. 174;
*United States v. Cruikshank,* 92 U. S. 558, 559.

And on the specific point that an allegation that an importation or other thing has been done "contrary to law," is fatal to the indictment, we cite:

*United States v. Kee Ho,* 33 Fed. 333, 334, 335, 336;
*United States v. Thomas,* 4 Ben. 370;
*United States v. Chaplin,* 13 Blatchf. 186.
*United States v. Fraser,* 42 Fed. 140;
*State v. Parkersburg Brewing Co.,* 53 W. Va. 596.

We maintain that it is no answer to the point we make against the first count of the indictment that the statute provides that,

> "(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Manifestly this provision of the statute applies only to the *evidence in the case,* and not to the indictment. And we contend it is so held in:

> *Johnson v. United States,* 294 Fed. 753 (9th Circuit).

For the reasons we have stated and on the authorities we have cited, it is submitted that the first count of the indictment charges no violation of the statute, and that therefore the District Court erred in denying the motion of defendant in arrest of judgment and in passing judgment upon him on the first count.

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## IV.

### THE SECOND COUNT OF THE INDICTMENT CHARGES NO CRIME.

In the second count of the indictment it is charged that the *defendants* violated

> "a requirement of the Act of December 17, 1914, as amended February 24, 1919, *in that he, the said defendant,* did then and there knowingly, wilfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to-wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to-wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

Now, in the first place, this count is *void* on its face for incurable uncertainty. It charges that "he

the said defendant", did the things alleged; but there are *two defendants* named in the second count, and it is not alleged *which one* of the defendants is the person who did the things charged. It does not appear but that it was the co-defendant of plaintiff in error who committed the acts alleged, and not the plaintiff in error. It results that the second count charges no offense against the plaintiff in error.

In the next place, the *second count* charges no offense, in that the statute makes it unlawful for any of the persons it designates

> "to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package",

but the plaintiff in error is not charged in the indictment to be one of the persons, to-wit: *A person required to register under the provisions of the Harrison Narcotic Act* (42 Stat. 298).

This defect in the indictment is fatal to the second count.

*Jin Fuey Moy,* 241 U. S. 394.

Mr. Circuit Judge Hunt, speaking for the Court, said in *Lewis v. United States,* 195 Federal Reporter 678, 679 (9th Circuit):

> "In United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the Supreme Court held that any person not registered under section 8 of the act heretofore referred to cannot be taken to mean

any person in the United States, 'but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1'. It must therefore follow that, unless the defendant is one of the class required to register by section 1, such possession or control of narcotics is not made presumptive evidence of a violation of section 8 and of section 1.

By section 1 the persons (with certain exceptions) required to register are those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, or any derivatives or preparation thereof. The evidence fails to show that this defendant dealt in or distributed the drugs. There is no evidence that he was in the business of selling narcotics, or that he handed any drug to Morris, or attempted to do so. No one heard him negotiating or bargaining in respect to any drug, and it is not contended by the prosecution that the defendant received any money from Morris. He may have been addicted to the use of opium, and may have had possession of a quantity of the drugs; but, unless he was one of the class required to register, mere possession would not subject him to the penalties provided for violating section 1 of the statute. United States v. Jin Fuey Moy, supra; Johnson v. United States, 294 Fed. 753, decided January 21, 1924."

It is true that the statute makes it unlawful for

> "*any person* to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package",

but as held by the Courts in the cases above cited in reference to the meaning of the statute as to

the words "any person", it does not mean any person in the United States, but only such persons as are required to register under section one of the Harrison Narcotic Act.

> *United States v. Jin Fuey Moy* (above cited);
> *Lewis v. United States* (above cited);
> *Johnson v. United States* (above cited);
> *Swartz v. United States,* 280 Fed. 115 (5th Circuit).

Whilst it was thus held in respect to another provision in the statute where the broad and very general language, "any person", is used; still it is an elementary rule of statutory construction that the same meaning must be given the same words and terms in the same statute.

> *Rhodes v. Weldy,* 46 Ohio St. 242.

And there is another elementary rule of statutory construction requiring that the same meaning be given the words "any person", wherever they appear in the same statute, and especially in the same section of the statute. We refer to the rule of *noscitur a sociis.*

In the third place, the second count in the indictment is fatally defective in that it does not allege that the opium and yen shee were not *purchased, sold, dispensed in nor from the original stamped packages.*

Whilst the indictment alleges that the opium was not *then and there* in nor from the original stamped packages, yet this does not exclude the conclusion

that it was at one time previously in the original stamped packages, and if it was, it would not be a violation of the statute *in this particular* to thereafter purchase, sell, dispense or distribute it or any part of it without the need of first putting it back in the original stamped packages from which it had been at one time taken.

For the reasons we have given it is respectfully submitted that the *second count* is fatally defective and charges no crime. It therefore follows that the District Court erred in refusing to grant the motion in arrest of judgment respecting the second count and in passing judgment on that count.

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V.

## NO EVIDENCE OF GUILT ON EITHER COUNT OF THE INDICTMENT.

There is no substantial evidence tending to show that the plaintiff in error is guilty on the *first count* of the indictment. There certainly is no evidence that he either received or concealed, bought or sold, or did anything to facilitate the transportation or concealment after importation of the opium or yen shee, nor that he had any knowledge that it had been imported into the United States contrary to law.

Respecting the first count the evidence, in part, is as follows: Phil H. Oyer, a witness for the Government, testified that he is a deputy sheriff of

Monterey County, California; that he knew the defendant Wong Lung Sing by sight. That on November 18, 1923, he saw him coming from Salinas; the co-defendant was driving the automobile in which both defendants were riding; that "this defendant" got up and pulled down the curtains of the car, "in the rear of the car"; the defendants were then arrested "for speeding" by the witness and a traffic officer, Mr. Elasho; the latter took charge of the car and the witness took "that suitcase there with the opium in it." The "defendant" said he knew nothing of the opium, the contents of the valise or suitcase, that somebody put it in his car at Pajaro; "and we asked him where the key was, and he said he had no keys; we asked him who the overcoat belonged to,—Mr. Cording asked him who the overcoat belonged to, and he said it did not belong to him. I observed the search by the police officers of the defendant Wong Mat. I saw what the officers obtained from the defendant. They found two keys, a hypodermic needle, and some opium on a card or wrapped up in a paper, I think it was yen shee they called it. On the initial opening of the suitcase, it was opened by the police officers. *Traffic Officer Elasho had a key at that time, a skeleton key, or some key that would fit it. He opened it with that. Afterwards we found these two keys on the person of the defendant. That opened the suitcase.* Before the suitcase was opened at the jail the defendant told me that he was cutting fish in the cannery and he was going to see his cousin, Wong Chong, and

he had his rubber boots in this suitcase and knife and was going down to cut fish in the cannery. The defendant said he did not know what was in the suitcase, in answer to a question by Mr. Elasho. The suitcase was lying at the bottom of the car; in the rear in front of the back seat. It was not under the back seat. It was lying where the footboard was in back of the car. In front of the back seat. There was nothing over the suitcase; it was closed. He said, 'What have you got in the suitcase?' and he said, 'I can't say; I don't know.' This Chinaman here said that. This one did most of the talking at that time. Then Elasho said, 'I will find out,' and he said, 'You have not got any search warrant to find out.' This Chinaman here said that. I turned the suitcase over to Chief of Police Cording. He opened the suitcase. I think Elasho first opened it with his keys. The defendant denied that the opium belonged to him. He also denied that the suitcase belonged to him. At no time did I see the defendant Wong Lung Sing driving this car." (Trans. Rec. 9 to 18.)

The next witness for the Government was F. W. A. Cording. He testified, in part, that he was chief of police of the city of Monterey; that he knew the defendant Wong Lung Sing by sight; that he asked him what he had in the suitcase "and he told me he had clothes in there, and that he was going to work in a cannery. I asked him to open the suitcase and he told me he did not have the key. I asked him

if he was satisfied if I opened the suitcase and he told me to get a search warrant. *Officer Elasho tried one of his keys and found one of them to fit the suitcase.* I found two keys on the defendant, one fit the suitcase and one was smaller on a string. When I opened the suitcase I found the blanket was over the top, and there were 52 tins of opium wrapped up in newspaper and tied with string. I tried one of the keys on this suitcase and it opened it. It was one of the keys that I took off this defendant. It was on a string." (Trans. Rec. 18 to 22.)

The next witness for the Government was A. W. Roberts. He testified to being a Narcotic Officer and to having taken possession of the suitcase and contents. (Trans. Rec. 22.)

The next witness for the Government was Albert Elasho. He testified to the arrest, to seizing the suitcase containing the opium; that the Chinese denied he had a key, "*so I had a key that opened a suitcase about like his, with me, so I tried it, to see if it would open it,* but I never opened the case at all; they were searching for keys and could not find them, *so I told them I had a key that would open it and the district attorney told me to open the case,* and when we opened the case we found the cans of opium all wrapped up. I was present when the chief of police produced the keys. He said. 'Here is the key', he found the key. I don't know whether these keys were taken out of the overcoat, I couldn't say.

As a matter of fact the first I saw of the keys was they were in the hands of the chief of police; he immediately spoke about having the keys as soon as he had the keys; he said 'here are the keys now.' He had the short coat in his hand, just taking his hand out of that short coat pocket. I did not see him take any keys out of the pocket, but he had his hand in the pocket. This other Chinese who was arrested also was driving the car." (Trans. Rec. 23 to 29.)

For the defense, Wong Fat Shing testified that the automobile belonged to him; that the defendant Charley Wong You took the car without permission. (Trans. Rec. 30.)

Wong Lung Sing, the defendant, testified that he asked his co-defendant Charley Wong You where he was going with the automobile; this was at Watsonville. He replied that he was going to Monterey and the defendant said: "You go to Monterey, I will go with you to see my uncle in Monterey. I went with him about a little after one o'clock. Charley Wong was driving the automobile. I am not able to drive an automobile. This automobile did not belong to me. *I did not take any suitcase or any package with me when I went in the automobile with him at Watsonville.* The officer searched me. He looked in my coat pocket. He found some keys on my person at that time; that kind of key he found. He found the bunch of keys and he took one of the small keys away. He found

this bunch of keys in my pocket. He found a key in the coat pocket of the machine and that coat does not belong to me. It was a long overcoat. I had not put the overcoat in the automobile. *I didn't own it. It was in that overcoat the chief of police found two keys. Neither of these keys belonged to me. This suitcase and its contents did not belong to me. I did not put the suitcase in the automobile. I did not know that the suitcase was in the automobile or what its contents were when I went in the machine at Watsonville to ride to Monterey. I did not make a statement to the officers or anyone else that the suitcase contained rubber boots or that I was going to work in a cannery down at Monterey. I did not have any key on my ring or any place on my person that would open this suitcase.* When the chief of police found the two keys in the overcoat I did not have the overcoat on." (Trans. Rec. 32 to 37.)

It is respectfully submitted that there is no evidence tending to show that the dress suitcase and contents were ever *in the possession or control of the defendant Wong Lung Sing.* Therefore paragraph (f) of section 2 of the statute (Trans. Rec. 42, 43), making *possession* of a narcotic drug "sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury," has no application to the case, yet the verdict rests upon it. (Trans. Rec. 42, 43.)

True there is some evidence that a *key* was found in possession of the plaintiff in error that would

open the suitcase, but the arresting officer had a key of his own that would do the same thing, and no doubt there are many other persons having a key that would open the suitcase; this of itself proves nothing and at most it is but a constructive possession or an imputed possession, which is not the kind of possession the statute requires. The statute, we believe, demands evidence of an actual and conscious possession.

*Underhill on Crim. Ev.* (2nd Ed.) 527;
2 *Wharton's Criminal Ev.* (10th Ed.) sec. 758;
3 *Greenleaf on Ev.*, sec. 33;
18 *Am. & Eng. Ency. Law,* 487, 489, 490.

A constructive possession is not sufficient to hold a person responsible on a criminal charge.

*Sorenson v. United States,* 168 Fed. 785.

True, there is a statutory presumption of guilt under the act against the importation of smoking opium, from the possession of the drug.

*Gee Woe v. United States,* 250 Fed. 428;
*Luria v. United States,* 231 U. S. 9, 25;
*U. S. v. Yu Fing,* 222 Fed. 154;
*Dean v. United States,* 266 Fed. 694.

But to raise the presumption of guilt from the possession of the narcotic drug or the fruits or the instruments of crime, we respectfully contend they must have been found in the accused's exclusive possession. This is the distinction and point for

which we contend. Moreover, the evidence in this case showed and established possession in some one else.

There is no such evidence here as against the plaintiff in error. Granted, there is testimony that he misrepresented the contents of the dress suitcase, but he could do this and yet not have possession or control; no doubt he had been informed by Charley Wong You, the owner of the dress suitcase and contents, what was in it, and was attempting to shield him in misrepresenting its contents to the officers, if he did so; but this would not put *the actual possession* of the dress suitcase and contents on the plaintiff in error, nor would his requests that the officers get a search warrant as legal authority to open the dress suitcase have that effect. As to the negligible amount of opium and yen shee (see testimony of F. W. A. Cording, Transcript, pages 21, 22) found on the person of plaintiff in error it would not authorize a conviction under either count of the indictment.

In conclusion, as the evidence taken as a whole is entirely consistent with a reasonable hypothesis that the dress suitcase and contents were in the *exclusive possession* of the defendant Charley Wong You and belonged to him, and he alone was transporting it in the automobile he had taken from the owner (Trans. Rec. 30, 31), and the plaintiff was merely a passenger taking a ride from Watsonville to Monterey as shown by the uncontradicted testi-

mony in the case, the evidence will not sustain the conviction.

*Isbell v. United States,* 227 Fed. 788, 792.

As the entire evidence permits of a reasonable hypothesis consistent with the innocence of the plaintiff in error, it is insufficient in law to support the verdict that has been rendered against him.

> "Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

In the foregoing regard the authorities are uniform and manifold.

*Isbell v. United States,* 227 Fed. 788, 792 (8th Circuit), and the many cases therein cited.

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## VI.

### ERRONEOUS RULING.

Not only did the District Court err in denying the motion for a directed verdict, but it erred to the prejudice of the legal rights of the plaintiff in error, when it overruled his objection to the offer made by the prosecution as evidence against him, of the dress suitcase and its opium contents. The evidence

does not show nor tend to show that the plaintiff in error owned or had possession of the dress suit-case or contents; on the contrary, the evidence is that they belonged to Charley Wong You; they were therefore inadmissible as evidence against the plaintiff in error. The prosecution's offer of the evidence, the objection of the plaintiff in error to it, the overruling of the objection and the exception reserved to the ruling, will be found at pages 29 and 30 of the transcript of record.

The undisputed facts from the evidence establish and prove that the automobile was owned by Wong Fat Shing and was being operated on the afternoon of November 18, 1923, at Monterey, at the time it was seized by the officers, by Charley Wong You, an employee of Wong Fat Shing. These facts established presumptively that the possession of every article and thing being transported and in the automobile were in the possession of Charley Wong You, the employee of Wong Fat Shing, the owner of the automobile. Things which a person possesses are presumed to be owned by him.

The suitcase and opium was in the possession of persons other than the defendant, and cannot without some satisfactory evidence from the person in whose possession it was found, or from some other satisfactory source, connecting the defendant with the suitcase and opium, be introduced in evidence against the defendant. It cannot be contended or inferred from the evidence that the presence of the

suitcase and opium in the automobile was attributable to the defendant. The defendant did not own the automobile. He did not hire it, nor did he get into it until it reached Watsonville. No evidence was introduced on the trial of the case connecting the defendant Wong Lung Sing in any way with the automobile, or the suitcase of opium. The automobile belonged to Wong Fat Shing and was operated by his employee Charley Wong You, and neither of these persons were on trial; therefore this evidence was not competent evidence against the defendant, and the ruling made by the Court admitting them as evidence against the defendant was an error of law highly prejudicial against the defendant and he is entitled to a reversal of judgment for this reason.

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## CONCLUSION.

It is respectfully submitted that for the foregoing reasons the judgment should be reversed.

Dated, San Francisco,
November 19, 1924.

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